City Attorney's Office

3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

PHONE 480-312-2405
FAX 480-312-2548

MEMORANDUM

TO: Charter Review Task Force
FROM: Sherry R. Scott, Deputy City Attorney
CC: City Council, Bruce Washburn, Brent Stockwell, Carolyn Jagger; Tim La Sota
DATE: January 11, 2010
RE: Orange Coalition's proposal to amend Article 12, Sec. 2 **(Utilities)**

I have received a request to provide an analysis (which can be publically discussed) of the Orange Coalition's proposal to amend Article 12, Sec. 2 and how this proposal may differ from current law.

In short, the City's authority to condemn utilities is set out in the constitution and several statutes. The cities ability to operate utilities is also set out in state statutes. The Orange Coalition's proposal adds a few new requirements to those currently found in state law.

The Orange Coalition proposes the following underlined addition: The city may also furnish service to adjacent and nearby territories which are not served by a privately owned utility and which may be conveniently and economically served by the municipally owned and operated utility, subject to the limitations of the provisions of the general laws of this state.

A.R.S. §9-516 already states that when adequate utility service is being provided (within or outside city boundaries), the City cannot offer a competing service until the City acquires that portion of the private utility in question. This statute goes on to state that if the City acquires a public utility, which also serves an area outside of its jurisdiction, it **must continue** to serve that area unless it sells off part of the utility to another private utility company. The proposed amendment does not clearly address whether this addition would prevent a City from *deciding to condemn or voluntarily acquire* a private utility that also provides service outside of its jurisdiction.

In short, this new language presents potential conflicts in the area of utility condemnations and it prohibits voluntary acquisitions of companies also serving customers outside of the City (which does happen), but it does not offer a private utility any additional protections against unwanted municipal **competition**. (There are also separate statutes related to electric service competition, if the City is providing electric service outside of its service territory, requiring the City to first allow competition of this utility within its service territory. *See* ARS §9-520.)

The next amendment found in the Orange Coalition's proposal is the following underlined addition: Before passing an ordinance or taking any other action to acquire private utility property through eminent domain, the city must obtain a final order from the Arizona Corporation Commission finding and determining that the private utility is unable or unwilling to provide adequate service.

Currently, state law provides that a city can condemn a private utility (if it is doing so for a public purpose) in the same manner as other condemnation actions. The Arizona Corporation Commission (ACC) regulates rates and practices of private utility companies in an effort to make sure these companies are providing adequate service at fair rates. I have not found any Arizona statutes that would **require** the ACC to have a full hearing and issue "a finding" at the City's request, on the issue of whether a private utility is unable or unwilling to provide adequate service to its customers. In asking the ACC for such a finding prior to committing itself to condemning the private utility, the City would be asking the ACC to find that its citizens are receiving inadequate service without offering those citizens any enforceable solution to address the inadequate service in question. Given that the ACC is not a regulatory agency with jurisdiction over cities and does not hold hearings for the purpose of issuing "findings" for cities to use when deciding to initiate a condemnation proceedings, the proposed amendment has several legal and practical infirmities.